Jasmair Singh a/l Pajan Singh v Bir Singh a/l Teja Singh & Ors

HIGH COURT (KUALA LUMPUR) — APPEAL NO WA-12BNCVC-121–07 OF 2016
QUAY CHEW SOON JC
30 JULY 2020

Civil Procedure — Appeal — Appeal against judgment of sessions court — Transfer of property — Fourth defendant granted housing loan facility to plaintiff to finance transfer of property — Charge executed by plaintiff over property — Plaintiff defaulted monthly payment — Whether plaintiff entitled to return of property — Whether plaintiff entitled to challenge against dismissal of claim by sessions court — Whether plaintiff failed to prove that fourth defendant was negligent in allowing redemption of property — Whether sessions court judge was correct in finding that the third defendant was a bona fide purchaser for value without notice

Evidence — Expert evidence — Admissibility and relevancy of expert evidence — Whether expert evidence was conclusive and must be used to compel formulation of judgment of court

Evidence — Admissibility and relevancy of evidence — Additional documents submitted as evidence — Whether additional documents were relevant and admissible — Whether plaintiff could be allowed to rely on criminal court decisions in civil appeal

This is an appeal against a judgment of the sessions court which dismissed the appellant's claim against the respondents after a full trial. The present suit involved a property known as Lot No 20-B4-5 (No 46, Jalan BP 11) HS(D) No 6247, Bandar Selayang, Daerah Gombak, Selangor ('property'). In March 2010, the fourth defendant granted a housing loan facility to the plaintiff to finance his purchase of the property. As security for the loan, a charge was executed by the plaintiff over the property in favour of the fourth defendant in June 2001 ('charge'). The purchase price of the property was RM509,470. The plaintiff did not occupy the property, which was intended to be let out. Shortly after the loan was disbursed in July 2011, the plaintiff defaulted in the monthly instalment payment to the fourth defendant in October 2011. Several time indulgences were granted by the fourth defendant for the plaintiff to settle his indebtedness under the loan but the plaintiff failed to settle his indebtedness. The loan was terminated in July 2012. The property was transferred to the first defendant in April 2013 and transferred to the third

A defendant in June 2013. A charge was executed by the third defendant over the property in favour of the financier, Standard Chartered Bank Malaysia Bhd, according to the plaintiff, his signature was forged in the conveyance documents. The plaintiff never dealt with the first defendant to execute the power of attorney and the sale and purchase agreement ('SPA'). The plaintiff B argued that he never dealt with the second defendant to execute the transfer form, the RPGT form, the authorisation letter and the payment letter. The plaintiff contended that he did not appoint the second defendant's firm or gave any instructions to sell the property nor was the plaintiff at the second defendant's office premises to sign the conveyance documents. The plaintiff C alleged that the transfer of the property to the first defendant was fraudulent and without the plaintiff's knowledge. The plaintiff averred that he never received any money from the first defendant towards the sale of the property. The plaintiff sought a declaration to invalidate the transfer of the property to the first defendant and for the property to be retransferred to him. The plaintiff D sought the first defendant, the second defendant and the fourth defendant to pay the plaintiff the current market value of the property. Upon visiting the property in July 2014, the plaintiff realised that the renovation works were taking place on the property. Upon inquiries form the contractors, the plaintiff was informed that the property owner, the third defendant had engaged them E to carry out the renovation works. The plaintiff sought a declaration to invalidate the transfer of the property from the first defendant to the third defendant. For the claim against the fourth defendant, the plaintiff alleged that there was a negligence committed. In the submission, the plaintiff submitted that the learned sessions court had dismissed the plaintiff's application to F obtain the original copies of the conveyance documents for analysis by Jabatan Kimia Malaysia, resulting in the plaintiff's rights was compromised.

Held, dismissing the appeal with costs of RM8,000 to each defendants:

G (1) Expert evidence was not conclusive as it was merely an opinion evidence used to assist the court and such expert evidence must not be used to compel the formulation of the judgment of the court. The court in evaluating the expert evidence and after considering the credibility of the witnesses must still come to its own opinion. The court found that the H report was of little evidential value as the plaintiff himself conceded that his signatures in the common bundle of documents were completely different, substantially different or slightly different. It followed that the plaintiff's signatures were admittedly not similar, constant or consistent all the time. The report and the evidence given by the SP2 was unreliable I and that no weight could be attached to the report (see paras 30, 34 & 36).

(2) The dismissal was not under appeal in the proceedings. The plaintiff had filed an appeal against the dismissal but subsequently discontinued with the appeal. The plaintiff did not file any appeal or application thereafter

to reverse or set aside the dismissal. The plaintiff was stopped from challenging the dismissal. The learned sessions court judge was informed that the outcome of the police investigation on the alleged forgery was still under investigation. The investigating officer would not have been able to further enlighten the court on the alleged forgery (see paras 43–44).

(3) The plaintiff failed to give any explanation regarding the money received by the plaintiff's wife from the first defendant. The plaintiff did not call the plaintiff's wife as a witness. The plaintiff had clearly benefited from all payments. If the plaintiff truly did not sell the property to the first defendant, it was inequitable for the plaintiff to seek an order for the return of the property without paying a single cent for the payment made to the plaintiff's wife, the for the fourth defendant and the other payment which the plaintiff did not rebut (see para 52).

(4) The court concurred with the sessions court judge that it was unlikely the plaintiff did not receive any letters from the fourth defendant or was aware of the redemption of the property. It was correctly found that the plaintiff had failed to prove that the fourth defendant was negligent in allowing the redemption of the property. As it was found that the plaintiff had knowledge of the redemption of the property, the alleged lack of a phone call verification by the fourth defendant on the validity of the authorisation letter was immaterial. In any event, the fourth defendant had given evidence that it was not the fourth defendant's practice to obtain customer's confirmation on the authorisation letter. It was not challenged by the plaintiff and there was no rebuttal evidence led by the plaintiff to say otherwise. There was no allegation made in the pleadings that the fourth defendant was involved in or privy to the alleged forgery. There was no evidence adduced by the plaintiff to show the fourth defendant was privy to or had knowledge of the alleged forgery (see paras 55–57).

(5) The fact that that the High Court admitted the additional documents to be used as fresh evidence for the appeal meant that they were relevant and admissible evidence for consideration of the appeal (see para 60).

(6) The court rejected attempts by litigants to import evidence which were produced in criminal proceedings and the evidentiary findings and conclusion of criminal proceedings, into civil proceedings. The plaintiff could not be allowed to rely on the criminal court decisions in the civil appeal (see para 67).

(7) The sessions court judge was correct in finding that the third defendant was a bona fide purchaser for value without notice. The third defendant had good title over the property. The third defendant's counterclaim for such a declaration and for removal of the private caveat entered by the

plaintiff on the property was correctly allowed. Even if the decision was otherwise, the property could not be transferred back to the plaintiff as there was a charge attached over the property. There were no prayers to declare the charge invalid. The only relief available to the plaintiff was the alternative prayer for damages but the claim for damages was only directed against the first defendant, the second defendant and the third defendant (see paras 78–79).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap penghakiman oleh mahkamah sesyen yang menolak tuntutan perayu terhadap responden setelah perbicaraan penuh. Tuntutan semasa melibatkan hartanah yang dikenali sebagai Lot No 20-B4-5 (No 46, Jalan BP 11) HS(D) No 6247, Bandar Selayang, Daerah Gombak, Selangor ('hartanah tersebut'). Pada bulan Mac 2010, defendan keempat meluluskan kemudahan pinjaman perumahan kepada plaintif untuk membiayai pembelian hartanah tersebut. Sebagai jaminan pinjaman, gadaian telah dibuat oleh plaintif ke atas hartanah tersebut terhadap defendan keempat pada bulan Jun 2001 ('gadaian'). Harga belian hartanah tersebut adalah RM509,470. Plaintif tidak menduduki hartanah tersebut, dengan tujuan untuk disewakan. Sejurus selepas pinjaman tersebut dilepaskan pada bulan Julai 2011, plaintif gagal membayar ansuran bulanan kepada defendan keempat pada bulan Oktober 2011. Beberapa kali budi bicara telah diberikan oleh defendan keempat untuk plaintif menyelesaikan hutang di bawah pinjaman tersebut tetapi plaintif telah gagal menyelesaikan hutang beliau. Pinjaman tersebut ditamatkan pada bulan Julai 2012. Hartanah telah dipindah milik kepada defendan pertama pada bulan April 2013 dan dipindah milik kepada defendan ketiga pada bulan Jun 2013. Gadaian telah dibuat oleh defendan ketiga atas hartanah tersebut bagi pemberi biaya, Standard Chartered Bank Malaysia Bhd, menurut plaintif, tandatangan beliau telah dipalsukan dalam dokumen pindah milik. Plaintif tidak pernah berurusan dengan defendan pertama untuk menandatangani surat kuasa wakil dan perjanjian jual beli ('SPA'). Plaintif berpendapat bahawa beliau tidak pernah berurusan dengan defendan kedua untuk menandatangani borang pindah milik, borang RPGT, surat kebenaran dan surat pembayaran. Plaintif mendakwa bahawa beliau tidak melantik firma defendan kedua atau memberikan arahan untuk menjual hartanah tersebut atau plaintif juga tidak hadir ke premis pejabat defendan kedua untuk menandatangani dokumen pindah milik. Plaintif mendakwa bahawa pindah milik hartanah kepada defendan pertama adalah suatu penipuan dan tanpa pengetahuan plaintif. Plaintif menyatakan bahawa beliau tidak pernah menerima sebarang wang daripada defendan pertama untuk penjualan hartanah tersebut. Plaintif memohon suatu deklarasi untuk membatalkan pindah milik hartanah tersebut kepada defendan pertama dan agar hartanah tersebut dipindah milik semula kepadanya. Plaintif memohon agar defendan pertama, defendan kedua dan defendan keempat untuk membayar plaintif nilai harga pasaran semasa hartanah tersebut. Semasa

melawat hartanah tersebut pada bulan Julai 2014, plaintif menyedari bahawa kerja-kerja pengubahsuaian sedang dijalankan ke atas hartanah tersebut. Setelah menyoal kontraktor, plaintif dimaklumkan bahawa pemilik hartanah tersebut, defendan ketiga telah melantik mereka untuk melakukan kerja-kerja pengubahsuaian. Plaintif memohon suatu deklarasi untuk membatalkan pindah milik hartanah tersebut dari defendan pertama kepada defendan ketiga. Bagi tuntutan terhadap defendan keempat, plaintif mendakwa terdapat kecuaian yang telah dilakukan. Berdasarkan penghujahan, plaintif menghujahkan bahawa hakim mahkamah sesyen yang bijaksana telah menolak permohonan plaintif untuk mendapatkan salinan asal dokumen pindah milik untuk dianalisa oleh Jabatan Kimia Malaysia, yang telah menyebabkan hak plaintif telah terjejas.

Diputuskan, menolak rayuan dengan kos sebanyak RM8,000 kepada setiap defendan:

(1) Keterangan pakar adalah tidak konklusif kerana ianya hanya keterangan pendapat yang digunakan untuk membantu mahkamah dan keterangan pakar seharusnya tidak boleh digunakan untuk memaksa mahkamah dalam membuat keputusan. Mahkamah dalam menilai keterangan pakar dan setelah mempertimbangkan kredibiliti saksi masih harus membuat dapatannya sendiri. Mahkamah mendapati bahawa laporan tersebut adalah begitu kecil nilainya oleh kerana plaintif sendiri mengakui bahawa tandatangannya dalam ikatan dokumen bersama adalah sangat berbeza, jauh sekali berbeza atau sedikit berbeza. Ini menunjukkan bahawa tandatangan plaintif diakui tidak serupa, tetap atau konsisten sepanjang masa. Laporan dan keterangan yang diberikan oleh SP2 tidak boleh dipercayai dan tidak ada berat yang dapat dilampirkan pada laporan tersebut (lihat perenggan 30, 34 & 36).

(2) Penolakan tersebut adalah tidak tertakluk kepada rayuan dalam prosiding tersebut. Plaintif telah memfailkan rayuan terhadap penolakan tersebut tetapi seringkali menghentikan rayuan tersebut. Plaintif tidak memfailkan rayuan atau permohonan selepas itu untuk membatalkan atau mengenepikan penolakan tersebut. Plaintif dihalang untuk mencabar penolakan tersebut. Hakim mahkamah sesyen yang bijaksana telah dimaklumkan bahawa hasil siasatan polis atas dakwaan pemalsuan tersebut masih dalam siasatan. Pegawai penyiasat tidak akan dapat memberikan keterangan lebih lanjut kepada mahkamah mengenai dakwaan pemalsuan tersebut (lihat perenggan 43–44).

(3) Plaintif gagal memberikan sebarang penjelasan mengenai wang yang diterima oleh isteri plaintif daripada defendan pertama. Plaintif tidak memanggil isteri plaintif sebagai saksi. Plaintif jelas mendapat keuntungan daripada kesemua pembayaran. Sekiranya plaintif benar-benar tidak menjual hartanah tersebut kepada defendan pertama,

maka tidak adil bagi plaintif untuk memohon perintah untuk pengembalian hartanah tersebut tanpa membayar satu sen pun bagi pembayaran yang telah dibuat kepada isteri plaintif, defendan keempat dan pembayaran lain yang tidak dibantah oleh plaintif (lihat perenggan 52).

(4) Mahkamah bersetuju dengan hakim mahkamah sesyen bahawa ianya tidak mungkin plaintif tidak menerima sebarang surat dari defendan keempat atau mengetahui penebusan hartanah. Ianya telah didapati dengan tepat bahawa plaintif gagal membuktikan bahawa defendan keempat cuai dalam membenarkan penebusan hartanah tersebut. Oleh kerana ianya telah didapati bahawa plaintif mempunyai pengetahuan tentang penebusan hartanah tersebut, dakwaan kurangnya pengesahan panggilan telefon oleh defendan keempat mengenai kesahihan surat kebenaran adalah tidak penting. Bagaimanapun, defendan keempat telah memberikan keterangan bahawa ianya bukanlah amalan defendan keempat untuk mendapatkan pengesahan pelanggan pada surat kebenaran. Perkara tersebut tidak dibantah oleh plaintif dan tidak ada keterangan untuk membantah yang dikemukakan oleh plaintif untuk mengatakan sebaliknya. Tidak ada dakwaan yang dibuat dalam pliding bahawa defendan keempat terlibat atau mengetahui dakwaan pemalsuan tersebut. Tidak ada keterangan yang dikemukakan oleh plaintif untuk menunjukkan defendan keempat mengetahui atau memiliki pengetahuan tentang pemalsuan yang didakwa (lihat perenggan 55–57).

(5) Fakta bahawa Mahkamah Tinggi menerima dokumen tambahan untuk digunakan sebagai bukti baru bagi rayuan tersebut bermaksud bahawa ianya adalah bukti yang relevan dan boleh diterima pakai untuk pertimbangan rayuan (lihat perenggan 60).

(6) Mahkamah menolak percubaan peguamcara untuk mengguna pakai keterangan yang dikemukakan dalam prosiding jenayah dan dapatan keterangan dan kesimpulan prosiding jenayah, ke prosiding sivil. Plaintif tidak boleh dibenarkan untuk bergantungan pada keputusan mahkamah jenayah dalam rayuan sivil (lihat perenggan 67).

(7) Hakim mahkamah sesyen telah tepat dalam membuat dapatan bahawa defendan ketiga adalah pembeli suci hati dengan balasan berharga. Defendan ketiga mempunyai hak atas hartanah tersebut. Tuntutan balas defendan ketiga untuk suatu deklarasi dan pembatalan kaveat persendirian yang dimasukkan oleh plaintif ke atas hartanah tersebut telah dengan tepat dibenarkan. Sekiranya keputusan yang dibuat adalah sebaliknya, hartanah tersebut tidak dapat dipindah milik semula kepada plaintif kerana terdapat gadaian yang dikenakan ke atas hartanah tersebut. Tidak ada perintah untuk menyatakan gadaian tersebut tidak sah. Satu-satunya relif yang ada untuk plaintif adalah perintah alternatif untuk ganti rugi tetapi tuntutan ganti rugi hanya ditujukan terhadap

defendan pertama, defendan kedua dan defendan ketiga (lihat perenggan 78–79).] A

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd) B

Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd [2015] 1 MLJ 284; [2014] 5 CLJ 533, CA (refd)

Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals [2015] 4 MLJ 34; [2015] 6 CLJ 425, CA (refd) C

Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors [2012] 1 MLJ 729, FC (refd)

Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd [2010] MLJU 2222; [2010] 6 CLJ 481, FC (refd)

Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 4 MLJ 651; [2010] 6 CLJ 530, CA (refd) D

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal [2006] 3 MLJ 289; [2006] 2 CLJ 251, CA (refd)

Hassan bin Hussin v Tengku Azhar Adib bin T Yusuf [2016] MLJU 1648, CA (refd) E

Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd [2014] 5 MLJ 535, CA (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113, SC (refd) F

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85, CA (refd) G

Legislation referred to

Criminal Procedure Code

Evidence Act 1950 ss 40, 41, 42, 43, 73(1), 114(g)

National Land Code Form 14A H

Penal Code s 471

Rules of Court 2012 O 40A r 3, O 59 rr 16(1), 23(1)

Yung Azwaire (Rusnan Hassan with him) (Rasshidi Ema & Yung) for the appellant.

Gopal Sri Ram (Harpal Singh and Marcus Lee with him) (T Harpal & Assoc) for the first and second respondent. I

K Pasupathy (G Logananth with him) (Naicker & Assoc) for the third respondent.

Chan Kok Keong (Cheo Kar Meng with him) (Shook Lin & Bok) for the fourth respondent.

Quay Chew Soon JC:

INTRODUCTION

[1] This is an appeal against a judgment of the sessions court delivered on 1 July 2016, which dismissed the appellant's claim against the respondents after a full trial. I dismissed the appeal. These are the grounds of my decision.

[2] The parties shall be referred to as they were at the session court, namely:

(a) the appellant — the plaintiff ('P');

(b) the first respondent — the first defendant ('D1');

(c) the second respondent — the second defendant ('D2');

(d) the third respondent — the third defendant ('D3'); and

(e) the fourth respondent — the fourth defendant ('D4').

(D1, D2, D3 and D4 collectively the 'defendants'.)

BACKGROUND

[3] The instant suit involves a property known as Lot No 20–84–5 (No 46, Jalan BP 11), HS(D) No 64312, PT No 6247, Bandar Selayang, Daerah Gombak, Selangor ('property').

With respect to D4

[4] In March 2010, D4 granted a housing loan facility ('loan') to P to finance his purchase of the property. As security for the loan, a charge was executed by P over the property in favour of D4 in June 2011 ('charge'). The purchase price of the property was RM509,470. P did not occupy the property, which was intended to be let out.

[5] Shortly after the loan was disbursed in July 2011, P defaulted in the monthly instalments payment to D4 in October 2011. At his requests, several time indulgences were granted by D4 for P to settle his indebtedness under the loan. Despite the indulgences, P failed to settle his indebtedness. As such, the loan was terminated in July 2012.

[6] A final indulgence was given by D4 vide a letter dated 16 August 2012. Amongst others, D4 accepted two post-dated cheques dated 25 August 2012 and 30 August 2012 of RM6,600 each issued by P's wife, one Narenjit Kaur a/p

S Charanjit Singh ('P's wife'). In the same letter of 16 August 2012, P was required to pay a sum of RM3,200 on 18 September 2012 and contact D4 on or before 21 September 2012.

[7] The said sum of RM3,200 was not paid by P on 18 September 2012. Instead, on the stipulated dated of 21 September 2012, D4 received a letter dated 20 September 2012 from Messrs Parminder K & Associates ('D2's firm') enclosing a letter of authorisation dated 20 September 2012 from P to D4 ('authorisation letter'). In the authorisation letter, the full details of P's loan account and the property were fully and accurately set out by D2's firm. It was also represented to D4, inter alia, that:

(a) D2's firm had authority to act and was representing P;

(b) P had agreed to sell the property to D1; and

(c) P had authorised D2's firm to request for a redemption statement and letter of undertaking to be issued by D4.

[8] The authorisation letter was allegedly signed by P and his signature was witnessed by D2. Acting on the authorisation letter, several redemption statements and letters of undertaking were issued by D4. Correspondence of various dates were exchanged among D4 and D2's firm or D1 over a period of about six months. Most of these correspondence (including redemption statements) were posted by D4 to P's usual correspondence address. Eventually, the property was redeemed after the redemption sum was received by D4.

With respect to D3

[9] The property was transferred to D1 in April 2013. Thereafter the property was transferred by D1 to D3 in June 2013. A charge was executed by D3 over the property in favour of his financier, Standard Chartered Bank Malaysia Bhd ('SCB'). The purchase price paid by D3 was RM648,000.

With respect to D1 and D2

[10] According to D1, in November 2011, P's wife contacted D1 to borrow RM120,000 on an urgent basis for a short period of time due to financial constraints. P's wife then offered the property to be purchased by D1 because P had to settle the loan. P's wife informed D1 that she had the consent of P to sell the property.

[11] D1 agreed to purchase the property. P's wife requested that, if the payments made under the sale and purchase agreement dated 5 December 2011 ('SPA') were refunded to D1 by May 2012, D1 would not

proceed with the purchase of the property. That is to say, the SPA will be cancelled. But if the payments were not returned within the stipulated time, D1 will be allowed to complete the SPA. Payments made by D1 were accounted towards the purchase price of the property.

[12] P's wife gave copies of P's identity card, the principal sale and purchase agreement between P and the developer (Keruan Jaya Sdn Bhd), the developer's letters to P for delivery of vacant possession, details of P's loan account, and the name of the financier (ie D4) to D2 for the preparation of the SPA.

[13] On 5 December 2011 ('signing date'), P and P's wife were allegedly present in D2's office premises to sign the following documents:

(a) the SPA;

(b) a Form 14A instrument of transfer, which was subsequently dated 15 March 2013 ('transfer form');

(c) the authorisation letter;

(d) a power of attorney dated 5 December 2011 by P to D1 ('power of attorney');

(e) a CKHT 1A real property gains tax return form, which was subsequently dated 3 January 2012 ('RPGT form'); and

(f) a letter dated 5 December 2011 from P to D2's firm authorising the payment of the purchase price to P's wife ('payment letter').

(collectively the 'conveyance documents').

[14] After P signed the conveyance documents and as instructed by P vide the payment letter, P's wife received two cheques issued by D1, totalling RM120,000. The cheques were cashed by P's wife on the signing date.

[15] P's wife attempted to refund the payments received by issuing post-dated cheques issued to D1. The first post-dated cheque dated 24 February 2012 was dishonored as it was issued from an account which was already closed. As there was no repayment within the stipulated time, D1 proceeded with the conveyance documents by redeeming the property from D4 and registering the transfer of the property.

[16] The purchase price stipulated in the SPA was RM550,000. After all payments had been made in accordance with the terms of the SPA, D1 received the keys to the property from P's wife.

P's case against D1 and D2

[17] According to P, his signature was forged in the conveyance documents. He never dealt with D1 to execute the power of attorney and the SPA. He also never dealt with D2 to execute the transfer form, the RPGT form, the authorisation letter and the payment letter. He did not appoint D2's firm or give any instructions to sell the property. Nor was he at D2's office premises to sign the conveyance documents.

[18] P alleges that the transfer of the property to D1 was fraudulent and without P's knowledge. P avers that he never received any money from D1 towards the sale of the property. P sought a declaration to invalidate the transfer of the property to D1 and for the property to be retransferred to him. Alternatively that D1, D2 and D4 pay to the current market value of the property.

D1 and D2's defence

[19] D1 and D2 denied P's claim. D2 reiterated that P and P's wife were present in D2's office premises on the signing date to sign the conveyance documents. D1 avers that he had made all payments under the SPA to P and through P's wife pursuant to the payment letter. As P's wife was directly involved with D1 in respect of the property, D1 filed third party proceedings against P's wife for indemnity and contribution.

P's case against D3

[20] According to P, upon visiting the property in July 2014, he realised that renovation works were taking place on the property. Upon inquiries from the contractors, P was informed that the property owner (ie D3) had engaged them to carry out the renovation works. P sought a declaration to invalidate the transfer of the property from D1 to D3.

D3's defence

[21] D3 avers that he is a bona fide purchaser for value without notice. He paid valuable consideration for the property. The property was transacted at market value namely RM648,000. He obtained a loan facility from SCB for 90% of the purchase price and paid the balance 10% to D1. D3 alleges that he did not have any knowledge of the circumstances surrounding the transfer of the property from P to D1.

P's case against D4

[22] P alleges negligence against D4 in allowing the redemption of the property premised on the following allegations:

(a) P's signatures on the authorisation letter, the SPA and the power of attorney were forged;

(b) P had no knowledge of the redemption of the property and the various correspondence exchanged among D4, D2's firm and D1 in connection therewith (including the redemption statements); and

(c) D4 had failed to verify with P on matters concerning the redemption of the property.

D4's defence

[23] D4's defence is that:

(a) D4 had at all material times received and acted upon the various instructions received from P or P's solicitors (ie D2's firm);

(b) D4 had at all material times taken reasonable steps and acted in good faith in allowing the redemption of the property. The redemption of the property was effected by D4 in accordance with normal banking and conveyancing practices;

(c) P was at all material times aware of or was deemed to have knowledge of the redemption of the property. The numerous redemption letters issued by D4 and the numerous letters of various dates exchanged between D4 and the parties concerned were duly sent and delivered to P at his usual correspondence address; and

(d) the alleged forgery of P's signature was inconsistent with the various documents received by D4 and the circumstances of the instant case.

FINDINGS OF THE SESSIONS COURT

[24] After a full trial, the learned trial judge ('SCJ') made, inter alia, the following findings in her grounds of judgment:

(a) P's expert witness, SP2 (a document examiner from Jabatan Kimia Malaysia), who prepared the Chemist Report dated 13 November 2014 ('report'), was appointed by PDRM (Polis Diraja Malaysia), and not P, for purposes of a criminal investigation. The report was prepared for a criminal investigation under the Criminal Procedure Code and not pursuant to the Rules of Court 2012 ('the Rules of Court'). Furthermore, the 'requirements of expert's evidence' under O 40A r 3 of the Rules of Court was not complied with;

(b) the report was not credible and did not show that P's signature was forged. SP2 had failed to set out the grounds or reasons to support his analysis in arriving at his conclusion in the report;

(c) in the report, SP2 came to the following conclusion:

> On comparison, I found that the questioned signature Q1 (Borang 14A) showed sufficient significant differences in handwriting characteristics from the specimen signatures 'S'.
>
> Hence, I am of the opinion that this *questioned signature was not written by the writer of the specimen*.

(d) SP2 confirmed that the report did not state that P's signature on the transfer form was forged. In particular, SP2 testified that:

> The signature on X is not written by the specimen of the writer. I am *not saying that it's a forged*.

(e) the documents used by SP2 for purposes of the signature comparison were not from the common bundle of documents and those documents were never furnished to the court. Therefore, the court was unable make comparison without sighting those documents;

(f) SP2 had only compared P's signature on the transfer form with the other specimens provided to him. However, those specimens were also not furnished to the court and the defendants were unable to cross-examine on the findings in the report;

(g) SP2 confirmed that a person may have many different signatures. P himself confirmed that his signatures were not consistent or constant. P had failed to prove on a balance of probabilities that his signatures were forged;

(h) failure on the part of P to call P's wife as a witness weakened his case. Since P's wife was a material witness in respect of the allegation that she had received a sum of RM120,000 from D1. Particularly when P admitted that P's wife told him that she had received the said sum of RM120,000 from D1;

(i) D3 was a bona fide purchaser for value without notice;

(j) D4 was not negligent in allowing the redemption of the property. It is impossible that P had not received any correspondence in respect of the redemption of the property, as he had only furnished one address to D4. P was untruthful and such bare denials of P was unsupported by evidence and was an afterthought; and

(k) P had failed to prove his claim on a balance of probabilities against the defendants. As such, P's claim against the defendants was dismissed.

[25] It is evident that this case was decided largely on findings of fact, and in particular with the conduct and demeanour of the witnesses.

APPELLATE INTERFERENCE

[26] An appellate court would be slow to interfere unless it was shown that the decision was plainly wrong (see the Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 10; [2004] 4 CLJ 309 at p 320). The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were set out in the Supreme Court case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113 at p 117:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an *appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so* unless it is satisfied that any *advantage enjoyed by the trial judge by reason of having seen and heard the witnesses*, could not be sufficient to explain or justify the trial judge's conclusion;
>
> The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court ...
>
> ... the duty of an appellate court in those circumstances is for each judge of it to put to himself, the question, 'Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of thejudge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was *plainly wrong*? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to *defer to his judgment*.

(see also the Court of Appeal case of *Hamit bin Matusin & Ors v Penguasa Tanah dan Survei & Anor and another appeal* [2006] 3 MLJ 289 at p 304; [2006] 2 CLJ 251 at p 270.)

[27] In *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85 at pp 106–107, the Federal Court set out the categories in which an appellate interference may be warranted. These include:

(a) where there was insufficient judicial appreciation of relevant evidence;

(b) where the findings by the judge do not accord well with the probabilities of the case;

(c) where facts were misapprehended and wrong principles were applied;

(d) where there was a failure to assess the evidence with documents at hand and view it against the probabilities of the case;

(e) where there was failure to consider the relevancy of contemporaneous documents; and

(f) where the findings of facts were contrary to the documentary evidence.

[28] The thrust of P's appeal is premised on the argument that the learned SCJ erred in making the findings mentioned earlier. In my opinion, the learned SCJ was correct in arriving at her judgment and P has not shown any basis to justify appellate intervention.

ALLEGED FORGERY

[29] The issue of the authenticity of P's signature on the conveyance documents is the core issue of P's litigation against the defendants, especially D1 and D2. P submitted that the learned SCJ erred in ruling that P had failed to prove that his signature was forged. To support his challenge of the alleged forgery, P relied heavily on the report prepared by SP2, who was called as an expert witness at trial.

[30] Expert evidence is not conclusive as it is merely an opinion evidence used to assist the court and such expert evidence must not be used to compel the formulation of the judgment of the court. In other words, the court, in evaluating the expert evidence and after considering the credibility of the witnesses, must still come to its own opinion. Support for this may be gleaned from the following authorities.

[31] In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at pp 213–214, the Federal Court said:

> In the Evidence Act, 1950, opinion of experts are under certain conditions admissible in evidence. Who are experts are explained in s 45 of the Act. Section 46 provides that facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant. DW2 was called as an expert witness. *Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts.* Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, *expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments.* In the ultimate analysis *it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion.* Therefore the nature of DW2's evidence must be examined in the light of the above principles. We see

nowhere in the records to suggest that the trial judge had incorrectly or improperly evaluated the evidence of DW2.

[32] In *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 at p 187, the Supreme Court said:

> The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of the witnesses it has seen and heard and taking into account any expert evidence on the point. Of course, a trial judge is not entitled to abdicate his function by allowing the expert to determine the question. In this case, we are satisfied that the teamed trial judge has not fallen into an error of this nature.
>
> Mr Joginder Singh has attacked Mr Phan's evidence on the ground that he *did not give reasons for coming to his conclusion that the signatures on each of the 97 cheques had been forged* and in support of his submission relied on a passage in the text book *The Identification of Handwriting and the Cross-Examination of Experts* by MK Mehta where the teamed author states (at p 23 of the text):
>
> > *It is common failing in a number of experts that they do not clearly state their reasons on which they base their opinions* while submitting the reports to the courts. The result is that the courts as well as the lawyers suffer from a distinct disadvantage. It is extremely difficult for them in such cases to test and verify the correctness of the opinions given. The *mere opinion of the expert that a particular writing or signature is written or not written by the writer whose standard admitted writings or signatures were supplied to him for comparison, without any cogent reason, is not enough.* The function of the expert is to give his honest opinion and place before the court all the data on which he bases his opinion, because *it is the court who has to decide the case and accept or reject his opinion.* In the absence of a clear and precise statement of his reasons, it is difficult for the court to appreciate the opinion of the expert. It is also not fair to the opposite side who is to cross-examine the expert on the correctness of his opinion. Any opinion given without stating the reasons is valueless and is of no use as evidence.
>
> We entirely agree with the passage cited. In a civil case and more so in a criminal case, the *evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written* and any reliance upon such evidence would, in our judgment, constitute a serious misdirection warranting interference by an appellate tribunal.

[33] In *Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 4 MLJ 651 at pp 659–660; [2010] 6 CLJ 530 at pp 540–541, the Court of Appeal said:

> ... the appellant had *failed to compare and contrast the signatures on the cheques, with the signature on the signature specimen card* or at worst the signature on the application form. The appellant instead, in order to establish the forgeries, had *merely compared the cheques with the 24 other specimen cheques (P73), but never with the signature specimen card*. In the course of the proceedings PW1 openly admitted that P73 was also never compared with the specimen signature cards kept in the

bank ... About the only important finding that came out of this comparison was that, as testified by this forensic document analyst, *the makers of the 24 specimen cheques and the 67 cheques were different people* as gleaned from the differences in the writing form and movement (RR72). *But this finding still did not prove that the signatures on the 67 cheques were forged.*

The appellant here is only required to establish, on a *balance of probability* that the signatures on the 67 cheques were forged, in that they were not that of Ong Ah Sim @ Ong Swee Hoe. Who signed them is actually not central to the issue before us. To establish that the signatures on the cheques were not of Ong Ah Sim, *comparison by necessity must be made with genuine signatures.* How better to arrive at a conclusive finding, if not by comparing the signatures on the 67 cheques, with the specimen signature card of Ong Swee Hoe kept by the respondent when processing the account? It will indisputably establish that the signatures are similar or not with the specimen signature card and finally deciding on the action. The existence of this signature specimen card was confirmed by DW1 in the course of his evidence. Apart from that specimen signature card the appellant could also have subpoenaed an officer from the respondent's bank to produce the application forms, which will show the signature of Ong Swee Hoe. For some unfathomable reason this was not done. We were therefore satisfied that the appellant's *approach to establish the cheques as forged, by making comparison with P73, and by no means conclusive, was a methodology that was totally unacceptable* and misguided. To totally sideline the specimen signature card or the application form was disastrous for the appellant.

The aforesaid Court of Appeal decision was upheld by the Federal Court in *Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2010] MLJU 2222; [2010] 6 CLJ 481.

[34] Following the aforesaid legal principles, I concur with the learned SCJ's finding that the report was of little evidential value. P himself conceded, during cross-examination, that his signatures in the common bundle of documents are 'completely different', 'substantially different' or 'slightly different'. It follows that P's signatures were admittedly not similar, constant or consistent all the time. This was observed by the learned SCJ in her grounds of judgment:

Plaintif pula mengaku bahawa tanda tangan Plaintif berbeza-beza.

[35] The report was rightly rejected by the learned SCJ as:

(a) SP2 failed to compare P's signature on the transfer form ('impugned signature') with the signatures on the loan application form and other banking documents maintained with D4. Instead, SP2 compared the impugned signature with other specimen signatures that were provided to him ('specimen signatures'). The specimen signatures were not produced before the court or made available for the defendants to cross-examine SP2 on the correctness of his opinion;

(b) based on P's own admission, it would not be surprising if the impugned signature was signed differently as compared to the specimen signatures; and

(c) SP2 confirmed during cross-examination that a person can have different sets of signatures. In the report, SP2 did not say that the signature on the transfer form was forged. Critically, SP2 did not provide clear and precise reasons for his findings in the report.

[36] Taking into consideration the above matters, I concur that the report and the evidence given by SP2 was unreliable and that no weight can be attached to the report.

SECOND REPORT

[37] P obtained leave from the High Court to produce a further chemist report dated 19 May 2016 ('second report') as fresh evidence for this appeal. The second report was also prepared by SP2. In my opinion, the above reasoning and findings of the learned SCJ would still apply and the decision of the learned SCJ would not have been different even with the second report.

[38] Similar to the earlier report, the second report sought to examine P's signatures on the authorisation letter and the power of attorney. I attach little weight to the second report because:

(a) the second report does not say that P's signatures were forged. It merely states that they were 'not written by the writer of the specimens'. Based on P's own admission at trial, his signatures are not constant or similar all the time;

(b) SP2 had similarly failed to compare P's signature on the authorisation letter and the power of attorney ('disputed signatures') with the signatures on the loan application form and other banking documents maintained with D4. Instead, SP2 had compared the disputed signatures with other specimen signatures that were provided to him. Those specimen signatures were not produced before the court or made available for the defendants to review; and

(c) critically, the second report also failed to set out clear and precise reasons for the findings of SP2. I find that the second report suffers from the same deficiencies as the earlier report.

[39] The Court of Appeal decision in *Hassan bin Hussin v Tengku Azhar Adib bin T Yusuf* [2016] MLJU 1648 delivered on 20 May 2016 vide Civil Appeal No D-02(NCVC)(W)-55–01 of 2015 (unreported) is on point. The brief facts of the case are:

(a) in 2001, the seller (respondent) sold the subject land to the buyer (appellant) who made full payment for the purchase price to the seller. However, the land was not transferred to the buyer immediately as the land was subject to a restriction in interest which prohibited any transfer of ownership for a period of ten years from the date the land title was issued. Similar to the instant case, the seller executed a power of attorney and Form 14A transfer in favour of the buyer;

(b) when the restriction ceased to have effect in 2011, the buyer tried but failed to trace the seller to secure his signature on the relevant documents for the purpose of transferring the land to the buyer. Upon enquiry at the Land Office, the buyer was informed that the final title was issued in 2008 and was collected by the seller. The buyer then lodged a private caveat on the register document of title in respect of the land. The buyer, however, was served with a notice for removal of the caveat around February 2013 applied by the seller as he intended to transfer the land to another person;

(c) the buyer then applied to the High Court seeking for various declarations including a declaration that the land was sold by the seller to the buyer and that the land was held by the seller as a bare trustee;

(d) the seller, on the other hand, denied selling the land to the buyer and further asserted, inter alia, that:

(i) he could not have done so as he did not know the buyer;

(ii) he did not execute any power of attorney or any Form 14A; and

(iii) his signatures on the power of attorney and Form 14A were forged;

(e) the High Court found in favour of the seller. On appeal, the Court of Appeal allowed the appeal and reversed the High Court decision. The Court of Appeal held that the buyer has on a balance of probabilities successfully proven his case against the seller based on the following findings:

(i) the allegation that the power of attorney and Form 14A were forged was not supported by any corroborative evidence. The burden is on the seller to prove his assertion of forgery;

(ii) pursuant to s 73(1) of the Evidence Act 1950 ('the Evidence Act'), the court is entitled to, and has undertaken a comparative visual examination of the seller's signature in the power of attorney with his signature in his witness statement. The court found significant and material similarities which are both apparent and obvious to the naked eye; and

(iii) the seller's failure to call one Che Mat (broker who offered to sell the land to buyer and who handled the land application for the seller)

to testify in the trial despite the fact that his evidence could be material to the crux of the matter has attracted an adverse inference to be drawn against him under s 114(g) of the Evidence Act.

[40] The Court of Appeal said:

> The respondent in his defence denied that he had signed the power of attorney and Form 14A. He claimed that his signature on the power of attorney was forged. However, the *defence did not adduce any evidence to prove that the signature and the thumbprint on the power of attorney and Form 14A respectively were forged. In dealing with this issue, we would start off by stating the obvious that is, the onus is on the appellant to prove his assertion.* This is the requirement under s 101 of the Evidence Act 1950. In *CC Siah Properties Sdn Bhd v Ang Kheng Huat* [2010] MLJU 1246; [2013] 3 MLRA 611, where the appellant alleged the signatures on the sale and purchase agreement were forged, the Court of Appeal held that the burden was on the appellant to prove such forgery. In *Good View Property Sdn Bhd v Standard Chartered Bank (M) Bhd* [2015] 1 MLJ 99; [2014] 6 CLJ 965, it was held that the burden of proving fraud was on the party alleging it.
>
> The appellant in the present action had led evidence through PW1 who testified that he witnessed the execution of the power of attorney and Form 14A by the respondent. The appellant too testified that the respondent executed these documents at the Land Office. It is in evidence that one of PW1's duties at the Land Office was to witness signatures and thumb prints on relevant documents. PW1 confirmed that the respondent signed the power of attorney and affixed his thumbprint on Form 14A on 5 December 2001. The respondent signed the power of attorney as the donor while the appellant was made the donee. As regards Form 14A, the respondent affixed his thumbprint thereon as the transferor. This evidence was completely unchallenged. The learned judge had clearly omitted to consider this crucial evidence. *In the absence of any further evidence that could corroborate the respondent's evidence of the alleged forgery, we hold that his evidence has failed to dislodge the testimony of PW1 and the appellant on this point.* Under the circumstances, the evidence of the respondent on the alleged forgery is devoid of any merits therefore must be rejected.

[41] Similarly, in the instant suit, it is noted that:

(a) D2 is an Advocate and Solicitor of the High Court of Malaya who did not know P prior to the property transaction between P and D1. D2 could not have prepared the authorisation letter without P's instruction concerning the details of the loan and the property;

(b) D2 testified that the authorisation letter was signed by P in her presence and in her office premises. P's presence at D2's office premises was corroborated by two eye witnesses (ie SD4 and SD6);

(c) P testified that his ex-colleague, SP4, could prove that P was on duty and could not have gone to D2's office premises to sign the authorisation letter. However, when SP4 was called, she was never examined and did

not give any evidence to that effect. As such, an adverse inference should be drawn against P that he was in fact present at D2's office premises and he had in fact signed the authorisation letter;

(d) the authorisation letter was prepared by D2 and submitted to D4 on 21 September 2012, the date on which P was required to contact D4 after a final time indulgence was given by D4 to P. It could not be such a coincidence unless such information (which was only known to P or P's wife) was provided to D2 and the authorisation letter was signed by P;

(e) according to the testimony of D1 and D2, the purchase price for the property was paid to and received by P's wife. Yet, P's wife was not called as a witness. Nor did P give any explanation regarding the money received. Again, this suggest that the property was in fact sold to D1 and the authorisation letter was signed by P;

(f) P was in default of repayments under the loan. Unless redeemed, D4 would have proceeded with auction sale of the property. As such, there was no reason for D4 to doubt P's sale of the property to D1 and the authorisation letter for the purpose of completing the said sale;

(g) P was in receipt of the various letters from D4, including redemption statements, and was aware of the redemption of the property (as found by the court below). Unless the authorisation letter was signed by him, P (who is a policeman and an educated man) could not have remained silent and not make any enquiry with D4 for an almost two-year period; and

(h) the non-payment and inaction on the part of P for such a long period of time can only mean that he had in fact sold the property and signed the authorisation letter.

[42] After weighing the evidence, the learned SCJ rightly came to the conclusion that P had failed to prove the alleged forgery on a balance of probabilities. I concur.

[43] In submission, P submitted that the learned SCJ had dismissed P's application to obtain the original copies of the conveyance documents for analysis by Jabatan Kimia Malaysia ('dismissal'), resulting in P's rights being compromised. However, the dismissal is not under appeal in these proceedings. P had filed an appeal against the dismissal but subsequently discontinued with that appeal. P also did not file any appeal or application thereafter to reverse or set aside the dismissal. As such, P is now estopped from challenging the dismissal.

[44] P alleges that the learned SCJ erred in failing to allow a certain investigating officer to testify. However, the learned SCJ below was informed that the outcome of the police investigation on the alleged forgery of P's signature was still under investigation. Given that investigations were ongoing, the investigating officer would not have been able to further enlighten the court below on the alleged forgery.

SALE OF THE PROPERTY

[45] P claims not to know D1 and D2 and not to have signed the conveyance documents at D2's office premises on the signing date. However, P's conduct and inaction is consistent with the fact that the property was sold to D1 and P's allegation of forgery of his signature is an afterthought.

[46] P failed to explain how D2 received copies of the P's identity card and documents relating to the property. D1 and D2 did not know about the property until details of P's loan, together with copies of documents relating to the property, were given by P's wife to D2. Those documents were needed for preparation of the SPA. D2 did not obtain them from D4 and could not have obtained them from any other source, other than from P or P's wife. The authorisation letter, which was delivered to D4 to release the redemption statement, was complete with details of P's loan and the property. D2 could not have prepared the authorisation letter without P or P's wife providing the said details.

[47] P claims to be at work on the signing date. However there is no proof of P not leaving work on that day. P relied on his colleague (SP4), to give evidence that P was on duty on the signing date and could not have been in D2's office premises on that day. However, SP4 did not lead any evidence that P was in his office on the signing date the whole day and that P did not leave his work place on that day during working hours.

[48] D2 testified that both P and P's wife were present in D2's office premises on the signing date. Their presence at D2's office premises on the signing date was corroborated by SD4 (neighbour to D2's office premises) and SD6 (part-time staff for D2's firm). Both SD4 and SD6 recognized P's wife and testified seeing her with a man in police uniform. Both their testimony were consistent with D2's testimony that P came to her office in his police uniform.

[49] SD6 testified that she had prepared the SPA, the transfer form and the RPGT form to be signed by P. That P came in his police uniform, together with P's wife, to sign the documents. This evidence of SD6 remains unchallenged.

[50] P's loan was recalled in July 2012 and he knew full well that D4 will sell the property by public auction unless it was redeemed. If P really did not sell the property to D1, P would have made queries with D4 when the first redemption letter was issued by D4 to him in October 2012. P never made any queries with D4 until late 2014 (nearly two years after D4's first redemption letter). This is indicative of the fact that P did have knowledge of the sale of the property.

[51] P's wife was personally involved in that she was authorised by P to conduct dealings concerning the property. P admitted that he was informed by P's wife that she had received RM120,000 from D1. Moreover, P did not dispute that his loan from D4 was redeemed by D1 and the other payments were fully settled pursuant to the SPA as follows:

(a) RM120,000 paid to P's wife on 5 December 2011 pursuant to the payment letter;

(b) RM399,018.33 paid to D4 towards the redemption sum of the property;

(c) RM11,000 paid to Lembaga Hasil Dalam Negeri for P's real property gains tax;

(d) RM100 paid to Tenaga Nasional Bhd for P's outstanding electricity bill;

(e) RM80 paid to the Land Office for quit rent 2013;

(f) RM1,460.40 paid to the municipal body for the 2013 assessments together with arrears, including late charges and fine; and

(g) RM18,400 balance payment to P's wife on 12 April 2013.

[52] P failed to give any explanation regarding the money received by P's wife from D1. P also did not call P's wife as a witness. P has clearly benefited from all these payments. If P truly did not sell the property to D1, it is inequitable for P to seek an order for the return of the property without paying a single cent for the payments made to P's wife, D4, and the other payments (which he did not rebut).

REDEMPTION OF THE PROPERTY

[53] P claims not to be aware of the redemption of the property. However it was in evidence that at all material times, P had maintained only one address with D4, which was declared as his residential and correspondence address. As such, all correspondence issued by D4 or exchanged with P were posted to the same address. This was not disputed by P.

[54] P insisted that he never received any letters from D4 after 30 August 2012, and thus was not aware of the redemption, even though the letters were posted to him at the usual address by the same mode of posting. However, no evidence was produced by P to substantiate the aforesaid bare denial. In contrast:

(a) D4 had through its witness, gave evidence on the posting of the various letters and redemption statements issued by D4 to P. There was no cross-examination made by P's counsel on such evidence. P is therefore precluded from denying the posting of such letters issued by D4 (see the Court of Appeal case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794);

(b) letters issued by D4 and posted to the usual address prior to the date of the authorisation letter were in fact received by P. Letters issued by D4 and posted to the usual address after the date of the authorisation letter should similarly be or must be deemed to have been received by P; and

(c) P knew very well that the property, unless redeemed, would be sold by public auction by D4. Since there was never any enquiry made with D4 on the property until late 2014 (nearly two years after the authorisation letter), a reasonable inference is that P had sold the property to D1 and had authorised D2's firm to deal with D4 concerning the redemption of the property.

[55] I concur with the learned SCJ that it is unlikely P did not receive any letters from D4 after 30 August 2012 or was not aware of the redemption of the property. The court below correctly found that P had failed to prove that D4 was negligent in allowing the redemption of the property.

[56] P alleged that D4 was negligent in allowing the redemption of the property by failing to obtain P's confirmation (through a phone call verification) as to the validity of the authorisation letter. As it has been found that P had knowledge of the redemption of the property, the alleged lack of a phone call verification by D4 on the validity of the authorisation letter is immaterial. In any event, D4 had given evidence that it was not D4's practice to obtain customer's confirmation on the authorisation letter. This was not challenged by P and there was no rebuttal evidence led by P at trial to say otherwise.

[57] There was no allegation made in the pleadings that D4 was involved in or privy to the alleged forgery. There was no evidence adduced by P at trial to show D4 was privy to or had knowledge of the alleged forgery.

FRESH EVIDENCE

[58] P obtained leave from the High Court, which decision was affirmed on appeal by the Court of Appeal, to adduce the following documents as fresh evidence in this appeal ('additional documents'):

(a) letter dated 18 July 2016 from Jabatan Immigresen Malaysia to Bahagian Siasatan Jenayah Komersil enclosing:

  (i) D1's entry record into Malaysia from 9 December 2011 to 25 March 2012;

(b) letter dated 1 September 2016 from Messrs Moideen & Max to Bahagian Siasatan Jenayah Komersil enclosing:

  (i) letter dated 29 August 2016 from AHK Air Hong Kong Ltd, Malaysia Branch to Bahagian Siasatan Jenayah Komersil; and

  (ii) D1's work roster from 2 December 2011 to 15 December 2011;

(c) police reports No 6616/2017 dated 3 April 2017 and No 6631/2017 dated 4 April 2017.

[59] According to P, the additional documents show that D1 was not in Malaysia on the signing date. Instead, D1 was in Hong Kong on that day. As such, D1 lied during the trial when he testified that he was in Malaysia on the signing date to collect the SPA (which P had supposedly signed at D2's office premises) and had submitted cheques to P's wife on that day.

[60] D1 argued that the additional documents are hearsay and inadmissible as the makers of those documents were not called as witnesses and were not subject to cross-examination. As such, no reference to the additional documents should be allowed during the hearing of this appeal. I disagree. The fact that the High Court admitted the additional documents to be used as fresh evidence for this appeal must mean that they are relevant and admissible evidence for consideration at this appeal. However, the weight to be attached to this fresh evidence is a separate matter.

[61] The court can determine the issue of the weight to be attached on an evidence which is admitted. Authority for this can be found in the Federal Court case of *Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors* [2012] 1 MLJ 729 at p 742 which said:

> In the law governing documentary evidence, as in oral evidence, three matters come to mind-relevancy, admissibility, and weight. They must be considered in that order. Only evidence which is relevant ought to be admissible. Irrelevant evidence should be rendered as inadmissible and the matter ends there. Now, *relevant evidence which is rendered admissible is still subject to the element of weight. The court can either attach*

due weight to the evidence, or some weight, little weight, or no weight at all. Due regard must be given to the authenticity of the evidence, its source, its contents, and more importantly, the surrounding circumstances of the case. This is where contemporaneous evidence would come in handy.

[62] I accept that on the face of it, the additional documents suggest that D1 was not in Malaysia on the signing date. Even so, they do not prove that P's signatures on the conveyance documents were forged. The main issue to be determined in this appeal is whether P's signatures were forged and whether P was unaware that the property was sold and redeemed (as alleged by P). The additional documents do not prove such allegations. Instead, the preponderance of evidence suggests otherwise. That P was aware of the sale and redemption of the property and signed the conveyance documents at D2's office premises on the signing date. That P's wife received the two cheques issued by D1 totalling RM120,000, as evidenced by her cashing those cheques on the signing date.

CRIMINAL PROCEEDINGS

[63] In submission, P referred to a Shah Alam Sessions Court Case No 62K-111–11 of 2016 and 62K-112/11 of 2016 wherein D1 and D2 were convicted for an offence under s 471 of the Penal Code and the documents in respect of their appeals ('criminal court decisions'). However, the criminal court decisions have not been properly admitted as evidence. Further, P is barred by s 43 of the Evidence Act from admitting the criminal court decisions in this civil appeal. The aforesaid section states:

> Judgments, orders or decrees other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment order or decree is a fact in issue or is relevant under some other provisions of this Act.

[64] The existence of the criminal court decisions is not a fact in issue in the present case. Rather P seeks to rely on the truth or assertions contained in the criminal court decisions, and this is prohibited by s 43 of the Evidence Act.

[65] None of the exceptions under ss 40, 41 or 42 of the Evidence Act apply in this case:

(a) the criminal court decisions are not relevant facts under s 40 of the Evidence Act to bar a second suit or trial;

(b) the criminal court decisions neither confer upon nor take away any legal character of P and they are not relevant facts under s 41 of the Evidence Act to the instant appeal, when the present appeal does not involve the exercise of probate, matrimonial, admiralty or bankruptcy jurisdiction; and

(c) the criminal court decisions are not related to matters of a public nature, rendering the criminal court decisions not relevant facts to the present appeal under s 42 of the Evidence Act.

[66] In the Court of Appeal case of *Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals* [2015] 4 MLJ 34; [2015] 6 CLJ 425, the plaintiff brought a defamation suit against the defendant in relation to a certain publication. The defendant relied on a remark in the majority judgment of the Federal Court in a sodomy case to the effect that there was evidence to show that the plaintiff was involved in homosexual activities. The Court of Appeal refused to admit the opinion in that criminal proceedings and said in pp 435–436:

> There is *no presumption that a prior judgment is the correct decision* on the matter. What the law of res judicata establishes is that one cannot go behind the decision in certain similar factual cases based on the ground of public policy. The *fact in issue in each case must be proved independently*.
>
> The rational underlying s 43 can be gleaned from the statement in *Hollington*'s case which is as follows: 'The court which has to try the claim for damages knew nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to the court or what influence the court in arriving at its decision. Moreover, the issue in the criminal proceeding is not identical with that raised in claim for damages'. In other words, as said in the Indian case of *Gopalkrishna Gupthan v Annmalu Ammal* AIR [1972] KER 196:
>
> > ... it is the duty of the court to scrutinise the soundness or validity of opinion evidence exercising its own independent judgment. In the case of a previous judgment such scrutiny is impossible because the court trying the subsequent case cannot reopen the case and hear it on the merits as if the court is hearing an appeal or is retrying the previous case on fresh evidence. The court in the subsequent case has to decide it on the materials before it exercising its own independent judgment.

[67] The courts have rejected attempts by litigants to import evidence which were produced in criminal proceedings, and the evidentiary findings and conclusion of criminal proceedings, into civil proceedings. P cannot be allowed to rely on the criminal court decisions in this civil appeal.

THIRD DEFENDANT

[68] To defeat D3's title to the property, P must prove that:

(a) the transfer of the property from P to D1 was procured by fraud or voidable and insufficient instruments ('first transfer");

(b) D3 has knowledge of the fraudulent first transfer prior to the transfer of the property to him ('second transfer'); and

(c) D3 was not a bona fide purchaser for value without notice.

[69] P's pleaded case against D3 is devoid of any particulars suggesting:

(a) that D3 had any knowledge of the circumstances surrounding the first transfer;

(b) that D3 was not a bona fide purchaser for value.

[70] As discussed earlier, it has not been proven that the first transfer is fraudulent. Based on the evidence and documentation before the court, the first transfer was a valid transfer. As such, I concur that D3 has indefeasible title over the property because he is a bona fide purchaser for value without notice.

[71] It cannot be disputed that D3 had paid valuable consideration for the purchase of the property. D3 purchased the property from D1 at market value of RM648,000, as evidenced by the *notis taksiran*. 10% of the purchase price was paid at the time of signing the sale and purchase agreement. The balance 90% of the purchase price was paid via a bank loan from SCB and the property was charged to SCB.

[72] Further, D3 is a bona fide purchaser as he did not have knowledge of the circumstances surrounding the first transfer. It is undisputed that D3 was not a party to the purported fraud or forgery. No pleadings and evidence was led to that effect. D3 pleaded and testified that he did not have any knowledge of the circumstances surrounding the first transfer.

[73] In fact, both P and D1 admitted during cross-examination that D3 was not privy to, nor did he have any knowledge of, the purported forgery. P even went further to agree that D3 was a bona fide purchaser for value without notice.

[74] When D3 and his father took the witness stand, there was no suggestion put to them that they knew of the circumstances surrounding the first transfer. Having failed to put his case to D3, P is now precluded from raising the same in submission. The authority for this is *Aik Ming* at p 794 where the Court of Appeal said:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[75] The only evidence which might suggest any such knowledge can be

found in P's witness statement at Q/A 14:

> He informed me that he had bought it from Jasmair, I then informed him that I am Jasmair and that I had never sold that property to him or anyone else. He then said he would check SNP, for the property and get back to me after a while, Gunaseelan called me back and informed me that he bought the house from Bir Singh. I'm just going on that now.

[76] D3's counsel had objected to this answer and asked for it to be expunged, but was directed to address this in submission. The above answer should be expunged because it is a material fact which may attach knowledge of the circumstances of the first transfer onto D3. However, this statement was never pleaded.

[77] In *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284 at p 298; [2014] 5 CLJ 533 at p 549, the Court of Appeal said:

> The trial of the suit must be confined to the pleadings and the court is not entitled to decide the suit on a matter which is not pleaded. In short, the parties are bound by their pleadings ...
>
> To formulate and advance a complete cause of action, the material facts must be pleaded ...
>
> The necessity of pleading all the material facts will be appreciated when one considers the principle that the parties are barred from adducing evidence of unpleaded facts during the trial.

[78] The learned SCJ was correct in finding that D3 is a bona fide purchaser for value without notice. Therefore, D3 has good title over the property. It follows that D3's counterclaim for such a declaration and for removal of the private caveat entered by P on the property was correctly allowed.

[79] Even if I were to decide otherwise, the property cannot be transferred back to P. This is because SCB has a charge over the property. However, SCB was not made a party to the instant suit despite P being fully aware of SCB's charge over the property. Further, there are no prayers before this court to declare SCB's charge to be invalid. The only relief available to P is the alternative prayer for damages. From the pleaded reliefs, the claim for damages is only directed against D1, D2 and D4.

[80] It follows that it is now impossible for D4's charge to be reinstated. It would be inequitable for P to have the property re-transferred to him without reinstating D4's charge or paying any redemption sum to D4 in respect of the loan. Furthermore, it is inequitable for P, through P's wife, to keep the purchase price paid by D1.

A COSTS

[81] P contended that the costs of RM40,000 awarded to each of the defendants by the learned SCJ is excessive. A trial judge has discretion to award costs after taking into account various factors, including those set out in O 59 r 16(1) of the Rules of Court. The appellate court would not interfere with such costs awarded by a trial judge, unless it can be shown that there has been an error of law or such discretion was wrongly exercised.

[82] In *Sagujuta (Sabah) Sdn Bhd v Trane Malaysia Sales & Services Sdn Bhd* [2014] 5 MLJ 535 at pp 544–545, the Court of Appeal said:

> The appellant also complained about the RM80,000 costs awarded by the learned High Court judge as being too excessive. On this issue, we find guidance in the decision of the Court of Appeal in *Malaysia International Consultants Sdn Bhd v RR Chelliah Brothers (Didakwa sebagai sebuah firma)* [2009] MLJU 107; [2009] 4 CLJ 731, that factors to be considered in awarding costs include, the nature of the claim, its seriousness, the importance of litigation to the client and the nature and extent of the work, that must be done in preparing the matter in question.
>
> An appellate court does not interfere in the question of costs without reluctance. The court below has an absolute discretion to deal with the matter. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion by the lower court was based on grounds wholly unconnected with the cause of action, (see *Petrolium Nasional Bhd (Petronas) & Anor v Cheah Kam Chew* [1987] 1 MLJ 25).

[83] The rules on the quantum of costs for advocacy is set out in O 59 r 23(1) of the Rules of Court. The scale of costs for trial in the subordinate courts is fixed up to a judgment sum of RM500,000. Where the judgment sum exceeds RM500,000, costs is discretionary but shall not exceed RM40,000. Here, the value of the subject-matter of the action the property) exceeds RM500,000.

[84] In the exercise of her discretion, the learned SCJ awarded costs of RM40,000 to each defendant after considering the following factors:

(a) the length of the trial — eight days;

(b) the number of witnesses involved — 16 witnesses;

(c) four defendants involved in the suit;

(d) the judicial time and costs incurred; and

(e) P's claim was found to be not genuine.

[85] I do not think that the learned SCJ had exercised her discretion wrongly and see no reason to interfere with this award of costs.

CONCLUSION

[86] In my judgment, appellate intervention is not justified in this case. I therefore dismissed the appeal. I ordered P to pay three sets of costs. A sum of RM8,000 to D1 and D2, RM8,000 to D3 and RM8,000 to D4.

Appeal dismissed with costs of RM8,000 to each defendant.

Reported by Mohd Kamarul Anwar